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Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re Applications of

ERIC R. HILDING

JUDY YEP HUGHES

For Construction Permit for a  
New FM Station on Channel 281A  
in Windsor, California

To: Review Board

MM DOCKET NO. 93-95

File No. BPH-911115MR

File No. BPH-911115MT

EXCEPTIONS AND BRIEFOFERIC R. HILDING

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September 16, 1993

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To: Review Board

**EXCEPTIONS AND BRIEF OF ERIC R. HILDING**

**I. STATEMENT OF THE CASE**

Eric R. Hilding (hereinafter "Hilding") submits his Exceptions And Brief in the above captioned matter resulting from an initial decision therein. 1/

The case involves the matter of application and grant of a construction permit for a new FM radio broadcast station based upon a set of Federal Communications Commission ("FCC") procedural guidelines referred to as "The 1965 Policy". 2/

For the reasons set forth herein, Hilding believes the decision resulted from irrational discriminations in The 1965 Policy and arbitrary and capricious inaction by the FCC.

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1/ Summary Decision Of Administrative Law Judge Richard L. Sippel, FCC 93D-17 (Released August 18, 1993).

2/ 1965 Policy Statement On Comparative Broadcast Hearings  
1 FCC 2d 393 (1965).

## **II. STATEMENT OF THE QUESTIONS OF LAW PRESENTED**

A. Whether a ("Pioneer") or "Petitioner" preference should flow to the creator ("Developer" or "Initiator") of the new FM channel service allocated and applied for?

B. Should a Technical Merit preference be awarded for use of a single-bay antenna to reduce multipath path interference & provide a better practicable service to the public?

C. Should a Technical Merit preference be awarded for proposed use of compact disc quality music service and digital audio delivery vehicles for better practicable service?

D. Whether the local service area residence attribution is an unwarranted and burdensome discrimination against any nonresident American citizen applicant for the new FM station?

E. Should evaluation of an applicant's volunteer civic participation track record give due consideration for public contribution without local service area restrictions?

F. Was applicant Hilding unfairly discriminated against by the FCC allowing applicant Hughes to amend her technically flawed application substantially after an established cut-off?

G. If a Caucasian male applicant has been, is, or may in any way be discriminated against and/or if his Civil Rights to due process & equal opportunity are obstructed by FCC policy.

H. Whether a "Veteran's Preference attribution should be given to any applicant, male or female, who has served their country and public by participation in U.S. Military Service?

I. Is an accommodation preference due applicant Hilding as a result of the FCC's arbitrary and capricious failure to act upon his May, 1985 Petition For Rule Making To Amend 1965 Policy On Comparative Broadcast Hearings?

J. Was applicant Hilding unfairly penalized and also prejudiced in the Windsor, California proceeding as a result of the FCC's failure to take timely action in its GC Docket No. 92-52, and is an accommodation preference in order?

K. Whether an additional accommodation preference is due applicant Hilding as a result of the FCC's complete lack of candor pertaining to the actual applications processing defect rate as correctly alleged by Hilding in Eric R. Hilding v. Federal Communications Communications?

L. Is applicant Hilding deserving of a "Public Service Benefit" preference resulting from his Channel Petitioner actions and efforts which have created eighteen (18) new FM community allotments in California between 1983 and 1993?

M. Should any applicant receive a preference for an commitment to broadcast "positive" oriented program content material over the airwaves?

N. Whether applicant Hilding's Civil Rights have been discriminated against due to abuse of agency discretion by the FCC in failing to disclose material facts of knowledge as to its eighty percent (80%) applications processing defect rate during the Metro Broadcasting, Inc. v. FCC and/or the Jerome Thomas Lamprecht v. FCC proceedings?

O. Is the National Interest of the United States of America being served or jeopardized by "The 1965 Policy"?

### III. ARGUMENT

A. Whether a ("Pioneer") or "Petitioner" preference should flow to the creator ("Developer" or "Initiator") of the new FM channel service allocated and applied for?

Beginning in 1985, Hilding initiated efforts subsequently supported by others for a rational, just and long "overdue" preference for those like himself who undertake the costly and time consuming process of development of new broadcast service to the public. The FCC has been out-of-sync with the fair and just principles of rewarding creativity and leadership such as in the realm of U.S. Copyright and Patent matters. 3/

A "Pioneer" or (Channel) "Petitioner" preference should flow to Hilding, the creator ("Developer" or "Initiator") of the new FM channel service allocated and applied for.

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3/ Ex Parte Allen, 33 PTCJ 638 (April 3, 1987). Diamond v. Chakrabarty, 447 U.S. 303 (1980).

- B. Should a Technical Merit preference be awarded for use of a single-bay antenna to reduce multipath path interference and provide a better practicable service to the public?

The FCC is charged with determining a "best practicable service" of an applicant, but has failed to keep pace with the myriad of technological advances and field studies have called for an upgrading of policy to best serve the public. It is widely known and accepted within broadcast engineering circles that a single-bay FM antenna can substantially reduce the potential "multipath" interference produced with multiple bay antenna installations. The FCC has been remiss in its failure to upgrade processing standards to reflect technological advances.

Due to the service area topography of the new Windsor FM facility, a Technical Merit preference should be awarded Hilding for his proposed use of a single bay antenna to reduce multipath interference and provide a better practicable service to the public in the overall Windsor service area.

- C. Should a Technical Merit preference be awarded for proposed use of compact disc quality music service and digital audio delivery vehicles for better practicable service?

Once again, the FCC is charged with determining a "best practicable service" of an applicant, but has failed to keep pace with the myriad of technological advances and consumer demand and expectations. The FCC has failed to keep pace in



upgrading its policy to best serve the public where compact disc recordings have become the "standard" of quality. Other digital delivery vehicles such as Satellite and DAT are today's standards of quality.

Hilding should be awarded a Technial Merit preference for his proposed use of compact disc quality music service and digital audio delivery vehicles for better practicable service to the public.

- D. Whether the local service area residence attribution is an unwarranted and burdensome discrimination against any nonresident American citizen applicant for the new FM station?

The current local service area residence preference is a violation of any American Citizen's Civil Rights to due process and equal opportunity, and serves no rational purpose. It suggests that a non-resident applicant is unfit to serve, which is a form of character defamation. To subject any potential applicant to speculatively move to a would-be new FM facility area, find interim employment and uproot a family with no guarantee of being recipient of a construction permit is the pinnacle of discrimination and bureaucratic mentality.

The local service area residence attribution is an unwarranted and burdensome discrimination against applicant Hilding who lives in Morgan Hill, California. Based upon a length of residence, it is also a discriminatory preference.

- E. Should evaluation of an applicant's volunteer civic participation track record give due consideration for public contributions without local service area restrictions?

The FCC's current preference for community or public service within a facility service area is supposedly a benchmark of an applicant's future community interface. It is also highly discriminatory, and a slap-in-the-face to the principles of volunteerism, and penalizes any person who gives of time and talent to help humanity regardless of area. Volunteerism should not be restricted by Geographical limits.

Applicant Hilding was not only a nominee for "Citizen Of The Year" for his volunteer contributions to the citizens of Morgan Hill, California, but also has a long track record of contributions in various cities and involving many charities. To receive no credit at all for these contributions because none took place in Windsor service area is discriminatory.

Applicant Hilding's volunteer civic participation track record should be given due consideration for public service contributions which in total, exceed those of the other party.

- F. Was applicant Hilding unfairly discriminated against by the FCC allowing applicant Hughes to amend her technically flawed application substantially after an established cut-off?

The FCC has had a history of allowing "minority" applicants to have additional unwarranted special privileges

to the unfair and discriminatory advantage over applicant Hilding in new FM proceedings. At Auberry, California, the Administrative Law Judge allowed a Black applicant to late-file his Integration Statement which assured the Black man of a "minority" preference. At Green Acres, California, a female "minority" applicant was allowed to publish her public notices many months late without penalty. In the Windsor proceeding, in spite of Hilding's timely filed Petition To Deny, the FCC still allowed "minority" applicant Hughes to amend her flawed technically application substantially after the amendment as of right cut-off had long expired. 4/ The technical defect should have been an issue against Hughes in the proceeding, and applicant Hilding was unfairly discriminated against.

- G. If a Caucasian male applicant has been, is, or may in any way be discriminated against and/or if his Civil Rights to due process & equal opportunity are obstructed by FCC policy?

The FCC's policy of both a "minority" and "female" preference is Unconstitutional. 5/ Metro Broadcasting, Inc. v. FCC is a prime example of why a bad decision does not result in good law, because it inherently promotes racial division and an "unlevel playing field" to Caucasian males.

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4/ Hearing Designation Order, MM Docket No. 93-95, DA 93-330 (Released April 8, 1993).

5/ Although as of the date herein the "female" preference has since been abolished, in an abundance of caution it is included. Hilding had previously been victimized in numerous proceedings because of the "female" preference, which some advocate return.

Applicant Hilding has been discriminated against and his Civil Rights to due process & equal opportunity have been obstructed by FCC policy. Metro needs overturning because it is bad for America and certainly not in the National Interest. Any "passive" based preference is socialism, not Americanism.

- H. Whether a "Veteran's Preference attribution should be given to any applicant, male or female, who has served their country and public by participation in U.S. Military Service?

In contrast to socialistic "passive" preferences, a person who does something, makes a contribution or is willing to risk their life for America deserves an "active" preference for making a contribution. This is in contrast to the welfare handout mentality which has driven American to extreme debt.

Applicant Hilding served in the U.S. Army Security Agency, and should receive a "Veteran's Preference" just as should any other Veteran whether male, female, black, white red, brown or yellow in skin color.

- I. Is an accommodation preference due applicant Hilding as a result of the FCC's arbitrary and capricious failure to act upon his May, 1985 Petition For Rule Making To Amend 1965 Policy On Comparative Broadcast Hearings?

The fact that the Commission acknowledged that Hilding's 1985 Petition For Rule Making was pending in 1987 during Eric R. Hilding v. Federal Communications Commission, but that no action has occurred as of September, 1993 is an atrocity.

Applicant Hilding is due an accommodation preference as a result of the FCC's arbitrary and capricious failure to act upon his May, 1985 Petition For Rule Making To Amend 1965 Policy On Comparative Broadcast Hearings. 6/

- J. Was applicant Hilding unfairly penalized and also prejudiced in the Windsor, California proceeding as a result of the FCC's failure to take timely action in its GC Docket No. 92-52, and is an accommodation preference in order?

The FCC had committed to an expedited action in GC Docket No. 92-52 involving Reexamination of the Policy Statement On Comparative Broadcast Hearings. 7/ The proposal addressed the archaic nature of the Policy and needs for revision, which delays in a decision therein have unfairly penalized and also prejudiced Hilding in the Windsor, California proceeding. 8/

- K. Whether an additional accommodation preference is due applicant Hilding as a result of the FCC's complete lack of candor pertaining to the actual applications processing defect rate as correctly alleged by Hilding in Eric R. Hilding v. Federal Communications Communications?

In his 1987 BRIEF FOR PETITIONER ERIC R. HILDING, Hilding

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6/ Smith v. Illinois Bell Telephone Company, 270 U.S., 587-592. Motor Vehicle Manufacturer's Association, et.al. v. State Farm Insurance Automobile Insurance Co., et.al., 436 U.S. 48 (1993).

7/ Notice Of Proposed Rulemaking, GC Docket No. 92-52, FCC 92-98 (Released April 10, 1992).

8/ When questioned as to why the 1985 Hilding Petition had not been referenced and/or included in the Notice, the FCC's General Counsel office response was that it was apparently "overlooked". The FCC was arbitrary and capricious in its inaction.

alleged the FCC's new FM applications processing procedures to be more than seventy percent (70%) defective. The FCC did not respond in truthfulness, but rather gave the impression that all was well in paradise. Two years later, however, and most conveniently after the case was decided, the FCC admitted to an eighty percent (80%) defect rate. The tide of application processing procedures and the matter of preferences could have well turned some time ago had the FCC been honest in 1987.

An additional accommodation preference is due applicant Hilding as a result of the FCC's complete lack of candor pertaining to the actual applications processing defect rate as correctly alleged by Hilding in his 1987 pleading.

- L. Is applicant Hilding deserving of a "Public Service Benefit" preference resulting from his Channel Petitioner actions and efforts which have created eighteen (18) new FM community allotments in California between 1983 and 1993?

In spite of the inability of Hilding to obtain even one FCC construction permit due to the discriminations set forth herein, he has nevertheless been the primary cause and/or a Channel Petitioner ("Pioneer") responsible for the allotment in of eighteen (18) new FM community allotments in California between 1983 and 1993, all of which from which the public at large will benefit. Applicant Hilding is deserving of some type of "Public Service Benefit" preference resulting from his actions and efforts. Initiative & leadership deserve reward.

- M. Should any applicant receive a preference for an advance commitment to broadcast "positive" oriented program content over the airwaves?

The decline of American values and increase in violence has been directly linked to non-positive program content. As applicant Hilding proposed to broadcast "positive" oriented program content as a primary focus, some degree of preference for "American Cultural Preservation" is warranted.

- N. Whether applicant Hilding's Civil Rights have been discriminated against due to abuse of agency discretion by the FCC in failing to disclose material facts of knowledge as to its eighty percent (80%) applications processing defect rate during the Metro Broadcasting, Inc. v. FCC and/or the Jerome Thomas Lamprecht v. FCC proceedings?

Applicant Hilding believes that had the FCC made a full disclosure of the material facts of its eighty percent (80%) defective rate in both the Metro and Lamprecht cases, that a more equitable set of "game rules" would have been in effect prior to the Designation For Hearing of the new Windsor FM proceeding. Applicant Hilding's Civil Rights have been discriminated against due to the FCC's knowledge of material fact and abuse of agency discretion by failure to disclose.

- O. Is the National Interest of the United States of America being served or jeopardized by "The 1965 Policy"?

Beginning in 1984, Hilding has filed documentation with the Commission which proposed a "First Right To File" for

any Channel Petitioner (Finder) responsible for the allocation of a new FM or TV broadcast channel for the public interest, convenience and necessity. Factually, and as recognized by the Commission in a related Memorandum Opinion and Order, such a method and procedure would provide for an expediting of new broadcast service to the public. Under such a fair and very equitable system also designed to promote ongoing research and development related to National productivity issues, as the party responsible for allotment of the new FM radio channel at Windsor, Hilding would deservingly receive the permit. 2/

Pursuant to the proposals advanced by Hilding in this proceeding with regard to delays in re-examination, amendment and modification of the Comparative Hearing Policy Statement, Hilding offered "Proffered Evidence" based upon modified criteria. The amended criteria (condensed from the proposals as advanced by Hilding) would provide for deletion of: 10/

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2/ For any small businessperson, legal and hearing expenses would have been eliminated. The new FM broadcast service could have been operationally serving the public and brand new employment opportunities created prior to the date on which simply the Hearing Designation Order was issued (April 8, 1993). Such a process would have also provided for an appropriate "incentive" and reward to any American willing to expend their time and financial resources to develop a new broadcast service. It would eliminate any type of factual (or perceived) ethnic or racial or gender discrimination. It would afford any fledgling entrepreneur the opportunity to expedite related development of additional job opportunities and contribute to the economic needs of the Nation. Such a system would help America.

10/ Deletion would also eliminate any real (or perceived) bias or discriminations of any kind, as well as any "unequal" footing preferences based upon non-productive "passivity" instead of merit awards for productive "action" contribution to society.



X. "Minority"-Preference	No Longer Applicable
Y. Local-Residence/Service-Area	No Longer Applicable
Z. Civic-Involvement-in-the Community-or-Service-Area	No Longer Applicable

# AMENDED COMPARATIVE FINDINGS 11/

		<u>HILDING</u>	<u>HUGHES</u>
A. Integration		100%	100%
B. Auxiliary Power		Yes	Yes
C. Civic Involvement	12/	Strong	Moderate
D. Broadcast Experience		YES	No
E. "Pioneer Preference"	13/	YES	No
F. Technical Merit 1	14/	YES	No
G. Technical Merit 2	15/	YES	No
H. Military Veteran Preference	16/	YES	No

11/ Based upon the claims or proposals set forth in any of respective applicants' Standardized Integration Statements.

12/ Not limited to any one community or broadcast service area. Ranked by Strong, Moderate, Weak or none based on both time and diversity of contribution. Provides "equal footing" analysis to the public at large, not restricted to any one area, which is in greater conformity to the "yardstick" of an applicant's potential future interface of continued civic involvement.

13/ A/K/A "Channel Petitioner" or "Finders" Preference which rewards any action taking person regardless of race or gender.

14/ Technical Merit 1 based upon proven Engineering benefits of Hilding's proposed utilization of a Single Bay FM antenna over the two-bay proposal of Hughes. Hilding believes his proposal will result in the reduction of multipath and improve reception to better serve the public within the service area. This would, of course, provide for a greater "best practicable service".

15/ Technical Merit 2 based upon proposal for Compact Disc and/or digital audio delivery vehicles to provide maximum high technical quality of programming to the listening public. This includes proposal for use of any new technologies as available, and would provide for a greater "best practicable service".

16/ Once again based upon a form of "active" contribution to the public instead of non-productive "passivity". Recognizes the sacrifices made by men or women in service to our Country regardless of race.

Based upon the foregoing, Hilding would be recipient of the Windsor Construction Permit on this comparative basis even in utilizing less than the full spectrum of preferences sought by Hilding in this proceeding and appeal. 17/

Hilding requested that the Presiding Officer incorporate said Proffered Evidence within the final Order (or Summary Decision) for reference purposes. This was not done, as only several of the sought after preferences were acknowledged.

In consideration of all factors, applicant Hilding requests that all proposed preferences be granted as sought herein and included in a new evaluation of the case.

The National Interest of the United States of America is not being served, but is rather (for the reasons set forth herein, and most specifically pertaining to racial division discriminations and lack of "action" based preferences), being jeopardized by "The 1965 Policy".

#### IV. CONCLUSION

For the all of the foregoing reasons, Hilding believes the initial decision in this matter should be reversed, and that grant of the construction permit for new FM Channel 281A at Windsor, California, should be awarded to Eric R. Hilding.

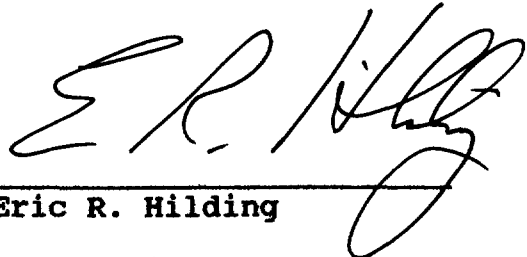
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17/ This "condensed" analysis is in no way meant to diminish or reduce the full sprectrum of preferences sought by Hilding but denied by Order, MM Docket No. 93-95 (June 11, 1993).

V. DECLARATION

I, Eric R. Hilding, under penalty of perjury, declare the foregoing EXCEPTIONS AND BRIEF OF ERIC R. HILDING to be true and correct of and/or to the best of my personal knowledge and understanding.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Eric R. Hilding", written over a horizontal line.

Eric R. Hilding

w/Certificate Of Service

Eric R. Hilding  
P.O. Box 1700  
Morgan Hill, CA 95038-1700  
Tel: (408)842-2222

Date: September 16, 1993

## **CERTIFICATE OF SERVICE**

I, Eric R. Hilding, under penalty of perjury, hereby declare that a copy of this "EXCEPTIONS AND BRIEF OF ERIC R. HILDING" has been sent via First Class Mail, U.S. postage prepaid, today, September 16, 1993, to the following:

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Administrative Law Judge  
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Eric R. Hilding

(\*) Included in the Federal Express package of original & copies filed with the Secretary